IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

MACON COUNTY INVESTMENTS, INC.; REACH ONE; TEACH ONE OF AMERICA, INC.,	)	
PLAINTIFFS,	)	
v.	)	**CIVIL ACTION NO.: 3:06-cv-224-WKW**
SHERIFF DAVID WARREN, in his official capacity as the SHERIFF OF MACON COUNTY, ALABAMA,	)	
DEFENDANT.	)	

DEFENDANT SHERIFF WARREN'S RESPONSE TO PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION

COMES NOW, Defendant Sheriff David Warren ("Sheriff Warren"), who has been sued in his official capacity as Sheriff of Macon County, Alabama, and respectfully requests this Court to deny Plaintiffs' Application for Preliminary Injunction and Expedited Hearing ("Motion") and responds as follows:

FACTUAL BACKGROUND

The operation of bingo games for prizes or money by nonprofit associations is authorized by the Constitution of Alabama, 1901, Amendment No. 744 and by Ala. Act No. 2003-124. Pursuant to Amendment No. 744, the Alabama Legislature delegated its authority to promulgate rules and regulations for the licensing and conduct of bingo games to the Sheriff of Macon County. (Comp. at ¶ 6.) Specifically, Amendment No. 744 provides, in pertinent part, that:

> The operation of bingo games for prizes or money by nonprofit organizations for charitable, educational, or other lawful purposes shall be legal in Macon County. The sheriff shall promulgate rules and regulations for the licensing and operation of bingo games within the county. The Sheriff shall insure compliance pursuant to any rule or regulation. . .

Ala. Const. 1901, Amend. No. 744.

A. 2003 BINGO RULES

In accordance with the authority granted to him by the Legislature, the Sheriff promulgated the “Rules and Regulations for the Licensing and Operation of Bingo Games in Macon County” in December of 2003 (“2003 Rules”)[1]. (Comp. at ¶ 7.) The 2003 Rules provided for two types of bingo licenses: Class A Bingo License for the conduct of paper bingo, and Class B Bingo License for any and all games of bingo (including electronic bingo). (2003 Rules Section 1). In order to obtain a Class B Bingo License, the nonprofit organization had to complete an application and submit the application package to the Sheriff for approval or denial. (Ex. 1, Section 2, 3). The holder of a Class B Bingo License could only conduct bingo games at a “qualified location” in Macon County. (Ex. 1, Section

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[1] Attached hereto as Exhibit (“Ex.”) “1.” Plaintiffs only attached selected pages of the 2003 Rules and the Amendments to their Complaint. Sheriff Warren attaches hereto the complete copies of the Bingo Rules and Amendments so that this Court may have the complete documents before it for consideration. The inclusion of the complete copy of these rules, however, does not convert Sheriff Warren’s Motion to Dismiss into a Motion for Summary Judgment. 5C CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1371 (3d ed. supp. 2005) ("[W]hen the plaintiff fails to attach a pertinent document, it has been held that the defendant can attach that document to a motion for judgment on the pleadings without converting the motion into one for summary judgment."). This Court may consider extrinsic materials without converting the motion into one for summary judgment when: (1) the materials were referred to in and/or attached to the complaint; (2) the materials are central to plaintiff’s claims; **and** (3) the parties do not dispute their authenticity. *GFF Corp. v. Assoc. Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384-85 (10th Cir. 1997) (citing authorities from the First, Second, Third, Fourth, Sixth, Ninth, and Eleventh Circuits).

1(h).) The 2003 Rules defined a "qualified location" as a location that had been inspected and approved by the Sheriff and which had submitted satisfactory evidence of the following:

(i) public liability insurance in an amount not less than $5,000,000.00;
(ii) if liquor is served, liquor liability insurance in an amount not less than $1,000,000.00;
(iii) adequate parking for patrons and employees;
(iv) onsite security as prescribed by the Sheriff;
(v) onsite first aid personnel as prescribed by the Sheriff;
(vi) cash or surety bond in an amount not less than $1,000,000.00;
(vii) such accounting procedures, controls and security monitoring necessary to preserve and promote the operation of the bingo games and to ensure the protection of the charitable license holder and its patrons;
(viii) satisfactory evidence that the owner or owners of the location paid at least $5,000,000.00 for the land, building and other capital improvements (before depreciation) comprising said location or the value of said land, building and other capital improvements (before depreciation) must be at least $5,000,000.00;
(ix) satisfactory evidence that the location is fully compliant with the Americans with Disabilities Act ("ADA");
(x) satisfactory evidence that the owner or owners of such location have been residents of the State of Alabama for at least three (3) years.

(2003 Rules, Section 1(j)) (Comp. at ¶ 8.) The 2003 Rules also establish an appeal process for the denial of an application. (Ex. 1, Section 14.) Section 14 provides that any nonprofit organization whose application for a license has been denied "shall have the right to appeal such denial to the Macon County Commission and to the Circuit Court of Macon County." (Ex. 1, Section 14.) It is important to note that the Plaintiffs do not challenge or contest any portion of the 2003 Rules.

B. 2004 AMENDMENTS TO THE BINGO RULES

On June 2, 2004, the Sheriff amended the 2003 Rules and issued the First Amended and Restated Rules and Regulations for the Licensing and Operation of Bingo Games in Macon County ("2004 Amendments")[2]. (Comp. at ¶ 10.) Plaintiffs contend that the Sheriff issued the 2004 Amendments "[w]ithout justification and for no announced reason." (Comp. at ¶ 10.) However, this is patently false.

When the Sheriff promulgated the 2004 Amendments, he included a "Commentary to Amended and Restated Bingo Regulations." (Ex. 2, Commentary to 2004 Amendments). The Commentary highlighted the amendments to the 2003 Rules and explained the rationale behind the decision to amend the 2003 Rules:

> Having had the opportunity to evaluate and regulate the licensing and operation of bingo games in Macon County, Alabama, pursuant to Amendment No. 744 of the Constitution of Alabama, the Macon County Bingo Regulations are hereby amended and restated in their entirety in order to maintain, protect and enhance the integrity of, the viability and the economic benefit derived from, bingo games for the eligible nonprofit organizations in Macon County that offer material charitable and educational purposes in Macon County, Alabama. . .

(Ex. 2, Commentary to 2004 Amendments.) Even though the Plaintiffs only mention two of the amendments, the Sheriff actually made seven amendments that sought to strengthen and protect the integrity of bingo games conducted by nonprofit organizations. (Comp. at ¶ 11)(Ex. 2, Commentary to 2004 Amendments.) The two amendments of which the Plaintiffs complain are: (1) the capital investment amount required for a "qualified location" for the holder of a Class B License was increased from $5,000,000.00 to

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[2]A complete copy is attached hereto as Ex. 2.

$15,000,000.00; and (2) the requirement that at least fifteen (15) nonprofit organizations must obtain Class B Licenses prior to authorizing such a bingo operation at a qualified location. (Comp. at ¶ 11)(Ex. 2, Sections 1(j) and 2.)

Contrary to the Plaintiffs' contention that these rules were amended "for no announced reasons," the Sheriff explained in the Commentary that the increased capital investment requirement was necessary in order to: "require a qualified location to prove a significant investment and financial commitment to Macon County prior to becoming a "qualified location"." (Ex. 2, Commentary to 2004 Amendments, Section 1(j).) The Sheriff also explained the rationale for requiring at least fifteen nonprofit organizations to obtain Class B Licenses prior to authorizing Class B Bingo at a "qualified location":

> In order to maximize economic benefits to numerous nonprofit organizations in Macon County and to further avoid the potential abuse of a third party individual or business entity from using one nonprofit organization (or a minimal number) as a "front" to operate bingo games under a Class B License. . . By requiring at least fifteen (15) nonprofit organizations to obtain a Class B License prior to authorizing such a bingo operation at a qualified location, assurance is provided that a large representative group of charities is afforded the opportunity to obtain the economic benefits associated with a Class B License.

(Ex. 2, Commentary to 2004 Amendments, Section 2.)

C. 2005 AMENDMENTS TO THE BINGO RULES

On January 1, 2005, the Sheriff again amended the rules for the licensing and conduct of bingo games and issued the Second Amended and Restated Bingo Regulations ("2005 Amendments")[3]. (Comp. at ¶ 13.) The Plaintiffs object to one of the three amendments in the 2005 Amendments; the amendment which provides that at no time shall there be more than sixty (60) class B Bingo Licenses in Macon County. (Comp. at ¶ 13.) Although the Plaintiffs allege that the Sheriff issued the 2005 Amendments "[o]nce again without actual justification, and no announced reason," this is also false. (Comp. at ¶ 13.)

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[3]A complete copy of which is attached hereto as Ex. 3.

When the Sheriff promulgated the 2005 Amendments, he also provided a Commentary along with the 2005 Amendments. (Ex. 3 at pg. 13.) The Sheriff explained the reasons for the amendments:

> The Attorney General for the State of Alabama has recently conducted an exhaustive investigation and review of gaming activities in the State of Alabama, including but not limited to, bingo games conducted in Macon County, Alabama, pursuant to Amendment No. 744 of the Constitution of Alabama. In response to the Attorney General's recent findings and pronouncements, the [2004 Amendments] are hereby amended and restated to comport and comply with the Attorney General's definition of bingo games and policy to limit Class B bingo gaming activities in Macon County, Alabama, at a reasonable level whereby the Sheriff can more adequately and effectively regulate and enforce the proper conduct of such bingo games. Accordingly, the following changes have been made to the Macon County Bingo Regulations:
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> * * *
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> Section 2: A new sentence has been added to the end of Section 2 to limit the number of Class B Licenses that may be issued in order to follow the policy of the Attorney General to limit Class B bingo gaming activities in Macon County, Alabama, and to allow the Sheriff to more effectively regulate and enforce the proper conduct of such bingo games.

(Ex. 3 at pg. 13.)

Plaintiff Macon County Investments, Inc. ("MCI") was formed and incorporated on

June 2, 2005. (Comp. at Ex. 4.)[4] Plaintiff MCI is a for-profit organization "doing business in Macon County as a real estate development company." (Comp. at ¶ 2.) MCI filed its Articles of Incorporation with the Macon County Judge of Probate on July 14, 2005. (*Id.* at Ex. 4.) Six days later, on July 25, 2005, Plaintiff Reach One, Teach One (Reach One) applied for a Class B Bingo License and designated Plaintiff MCI to be its "qualified location." (Comp. at ¶ 15.) Plaintiff MCI was formed, and Plaintiff Reach One's application was filed, six months after the Sheriff issued the 2005 Amendments to the 2003 Rules. Section 14 of the 2003 Rules provides a process for appealing the denial of an application, and neither the 2004 Amendments nor the 2005 Amendments altered the appeal process. However, it is important to note that as of the date of the filing of Plaintiffs' Complaint, Plaintiff Reach One's application had not been denied and it had not invoked the appeal process. (Comp. at ¶ 16.)[5]

ARGUMENT

Plaintiffs' Motion for Preliminary Injunction is due to be denied on three grounds. First, the Plaintiffs do not seek to preserve the status quo but instead seek to alter the status quo in an attempt to obtain complete relief. Second, the Plaintiffs have failed to present any evidence to establish any of the four factors necessary for the issuance of a preliminary injunction. Finally, the Plaintiffs alleged claims are not ripe for adjudication.

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[4] Plaintiffs attached the application that they submitted to the Sheriff for a Class B Bingo License as an Exhibit to their Complaint. (Comp. at Ex. 4)

[5] Although Plaintiffs have phrased their allegations and the relief they seek in such a way that it appears that both Reach One and MCI applied for a Class B Bingo License and that they would both be entitled to a Class B Bingo License if they prevail, this is inaccurate. Amendment No. 744, and the Macon County Bingo Rules, only provide for the licensing of a nonprofit organization for the conduct of bingo. Amendment No. 744 does permit a nonprofit organization to contract with another entity to operate the games and the facility. However, only Plaintiff Reach One applied and could possibly be eligible to obtain a Class B Bingo License (assuming that Plaintiff Reach One met the qualifications). The 2005 Amendments do provide for a Class B Bingo Operator's License, but Plaintiff MCI does not allege that it has applied for such a license or that it would meet the qualifications for the issuance of such a license.

I. PLAINTIFFS SEEK TO ALTER THE STATUS QUO

Plaintiffs' Motion for a Preliminary Injunction should be denied because they seek to disturb rather than preserve the status quo. The purpose of a preliminary injunction is to preserve the status quo in order to prevent irreparable injury to the moving party until the district court can render a decision on the merits. *Canal Auth. of State of Fla. v. Calloway*, 489 F.2d 567 (5th Cir. 1974); *Mark Dunning Indus., Inc. v. Perry*, 890 F. Supp. 1504, 1510 (M.D. Ala. 1995); *Clark Const. Co., Inc. v. Pena*, 895 F. Supp. 1483 (M.D. Ala. 1995). Plaintiffs' Motion should be denied because they seek to disturb rather than preserve the status quo. Plaintiffs seek the imposition of a preliminary injunction "which directs the Defendant Sheriff to grant the Plaintiffs' application for a Class B Bingo facility and to issue a Class B Bingo license to the Plaintiffs." (Comp. at Prayer for Relief at ¶ B.) Plaintiffs also seek to "enjoin the Defendant Sheriff from operating under the Amended Rules." (*Id*. at ¶ C.) The purpose of a preliminary injunction is to preserve the status quo. *King v. Saddleback Junior College Dist*., 425 F.2d 426 (9th Cir. 1970), *certiorari denied,* 404 U.S. 979, 404 U.S. 1042 (defendant should not have been enjoined to allow plaintiffs to register at college despite dress code); *Warner Bros. Pictures, Inc. v. Gittone*, 110 F.2d 292, 293 (3rd Cir. 1940).

The status quo in this case is that the Plaintiffs have neither been granted nor denied a Class B Bingo license. Plaintiff Reach One, Teach One submitted an application for Class B Bingo to the Sheriff's office on July 25, 2005. (Comp. at ¶ 15.) Morever, the Sheriff and fifty-nine current Class B Bingo licensees and one Class B Bingo Operator are operating pursuant to the Second Amended and Restated Regulations for the Conduct of Bingo in Macon County, Alabama. What Plaintiffs really seek is to alter the status quo through the imposition of a preliminary injunction. The imposition of a preliminary injunction, *i.e.*, compelling the Sheriff to grant Plaintiff Reach One a Class B Bingo License, would fundamentally change the status of the parties. *See, e.g.*, *Bell Atl. Business Sys. Servs., Inc. v. Hitachi Data Sys. Corp.*, 856 F.Supp. 524 (D.C.Cal.1993). Therefore, Plaintiffs' request for a preliminary injunction is due to be denied.

II. PRELIMINARY INJUNCTION STANDARD

Plaintiffs' Application for a Preliminary Injunction is also due to be denied because they have not and cannot establish the four elements necessary for the issuance of a preliminary injunction. In order to prevail on a motion for a preliminary injunction, a plaintiff must prove: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the preliminary injunction is not granted; (3) that the plaintiff's threatened injury outweighs the harm than an injunction may cause the defendant; and (4) that the injunction would not be adverse to the public interest. *Fed. R. Civ. P*. 65. An injunction is considered an "extraordinary and drastic remedy" which should not be granted unless the movant clearly carries the burden of persuasion with regards to all four of the factors. *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998); *United States v. Jefferson County*, 720 F. 2d 1511, 1519 (11th Cir. 1983).

Failure to establish the first factor, likelihood of success on the merits, is generally considered fatal. The Eleventh Circuit has held that a movant's failure to demonstrate a likelihood of success on the merits may defeat the movant's claim regardless of the ability to establish the remaining three factors. *Siegel v. Lapore*, 234 F.3d 1163, 1176 (11th Cir. 2000)(stating that "the absence of substantial likelihood of irreparable injury would, standing alone, make preliminary injunctive relief improper"). *See also*, *Church of the City of Huntsville*, 30 F.3d 1332, 1342 (11th Cir. 1994); *Reese v. Miami-Dade County*, 2003 WL 22025458 (11th Cir. July 14, 2003)(affirming a district court's denial of a motion for preliminary injunction on the basis that movant's failed to show irreparable injury on their claims). The decisions of this Court are in accord. *Butler v. Ala. Jud'l Inq. Comm'n*, 111 F. Supp. 2d 1224, 1229-30 (M.D. Ala. 2000); *A & M Enter, Inc. v. Houston*, 2001 WL 957956 (M. D. Ala. July 30, 2001). Indeed, this Court recently denied a motion for preliminary injunction on the basis that the movant failed to present any evidence of a substantial likelihood of success on the merits. *Johnson v. Keaton*, 2006 WL 317244 (M.D. Ala. Feb. 9, 2006).

A. Plaintiffs Cannot Establish A Likelihood of Success on the Merits

Next, Plaintiffs' Motion for Preliminary Injunction contains nothing more than conclusory statements that they are entitled to preliminary injunctive relief. Plaintiffs fail to present **any** evidence to establish the four prerequisites for the issuance of a preliminary injunction. Plaintiffs fail to present any evidence of a substantial likelihood of success on the merits. Plaintiffs allege that the Sheriff has "clearly denied Plaintiffs MCI and Reach One, Teach One equal protection under the laws. Further, there is no rational basis for the differential treatment of the Plaintiffs and the one Class B Bingo facility currently operating in Macon County." (Motion at ¶ 12.) Essentially, Plaintiffs argue that the 2004 and 2005 Amendments promulgated by the Sheriff violate the Equal Protection Clause because those Rules effectively "preclude applicants post June 2004 from obtaining a Class B Bingo license." (Comp. at ¶ 19.)

1. The Macon County Bingo Rules Do Not Violate the Equal Protection Clause Because They Are Rationally Related To A Legitimate State Interest, Namely The Regulation of a Gaming Activity.

The Equal Protection Clause of the Fourteenth Amendment requires the government to treat similarly situated persons in a similar manner. U.S. Const. Amend. XIV, § 1. When legislation does not infringe upon a fundamental right and does not involve a suspect class, "'equal protection claims relating to it are judged under the rational basis test: specifically, the ordinance must be rationally related to the achievement of a legitimate governmental purpose.'" *Gary v. City of Warner Robbins, Ga.*, 311 F.3d 1334 (11th Cir. 2002) quoting *Joel v. City of Orlando*, 232 F.3d 1353, 1357 (11th Cir. 2000) cert. denied 532 U.S. 978, 121 S.Ct. 1616, 149 L.Ed.2d 480 (2001); *see also, Lofton v. Secretary of the Dept. of Children and Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004)(explaining that "[u]nless the challenged classification burdens a fundamental right or targets a suspect class, the Equal Protection Clause requires only that the classification be rationally related to a legitimate state interest."). Plaintiffs do not contend that they have a constitutional or fundamental right to conduct bingo games. Indeed, numerous courts have held that there is no fundamental right to conduct or play bingo games. *St. John's Melkite Catholic Church* *v. Commissioner of Revenue*, 242 S.E. 2d 108 (Ga. 1978)(holding that bingo amendment to state constitution did not create a fundamental right); *Bingo Catering and Supplies, Inc. v. Duncan*, 699 P.2d 512 (Kan. 1985); *Durham Hwy Fire Protect. Ass'n, Inc. v. Baker*, 347 S.E. 2d 86 (N.C. App. 1986). *See also*, *Marvin v. Trout,* 199 U.S. 212, 26 S.Ct. 31, 50 L.Ed. 157 (1905)(stating that no one has a constitutional right to operate a gambling business) ; *Lewis v. United States,* 348 U.S. 419, 423, 75 S.Ct. 415, 418, 99 L.Ed. 475 (1955)(holding that there is no constitutional right to gamble). Moreover, Plaintiffs in the instant case have not alleged and it is clear that the regulations do not involve a suspect class. Because the present case involves neither a fundamental right nor a suspect class, analysis under the rational basis test is appropriate.

The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *Lofton*, 358 F.3d 804, 818 (11th Cir. 2004). The government has "'no duty to produce evidence to sustain the rationality of a statutory classification.'" *Id*. at 818 quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993). Instead, one who attacks the legislation bears the burden of negating "every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Id*. (citation omitted). Moreover, courts give great deference to economic and social legislation under the rational basis test. *Id*. at 1339. *Curse v. Director of Workers' Comp. Programs*, 843 F.2d 456,463 (11th Cir. 1998). The Supreme Court has explained:

> [w]hen local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. Unless a classification trammels fundamental personal rights or is drawn upon

> inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude, Legislatures may implement their program step by step in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines; in the local economic sphere, it is only invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.

Pettco Enterprises, Inc. v. White, 896 F. Supp. 1137 (M.D. Ala. 1995)(quoting *New Orleans v. Dukes*, 427 U.S. 297, 303-304 (1976))(citations omitted).

The Plaintiffs contend that it is a denial of equal protection for the Sheriff to amend the bingo regulations for Macon County to increase the minimum number of applicants required to conduct Class B bingo at a “qualified location” to fifteen (15) and to limit the number of Class B Licenses which can be issued in Macon County to a maximum of sixty (60). Plaintiffs allege that there is no rational basis for these regulations and that the regulations are arbitrary and capricious. However, Plaintiffs' contentions are due to be rejected because the 2004 Amendments and the 2005 Amendments are rationally related to the Sheriff, the County, and the State’s legitimate interest in protecting the integrity of bingo gaming and in limiting gaming activities in Macon County.

State and local governments, pursuant to their police powers, possess the authority to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort or general welfare of the community. In addition to these inherent police powers, the Sheriff is specifically authorized by the State Legislature and the citizens of

Macon County to promulgate rules which will protect the nonprofit organizations which are conducting the bingo games, the patrons of the bingo establishments, the recipients of the charitable proceeds, and the general welfare of the community.

The Legislature and the Attorney General of Alabama have evidenced a strong desire to carefully regulate and monitor gaming activities in the State of Alabama. The Legislature and the Attorney General have long espoused a policy of limiting bingo gaming activities. This is evident by the fact that it required the ratification of a constitutional amendment in order to permit the conduct of bingo games for charitable purposes in Macon County. The Sheriff was acting against this backdrop when he amended the 2003 Bingo Rules for the purpose of imposing additional regulations for the conduct of bingo in Macon County in an effort to prevent the commercialization of operations by establishing a minimum number of nonprofit organizations for each “qualified location” and by limiting the number of active Class B Licensees and to otherwise promote the public welfare consistent with the intent of Amendment No. 744.

The Sheriff included a Commentary to the 2004 Amendments which clearly explain the basis for requiring a minimum number of Class B Bingo Licenses which must be issued at one location before it can be approved as a qualified location. This limitation was rationally related to the Sheriff and the County’s interest in ensuring that the “qualified location” was not using one or a minimum number of nonprofit organizations as a “front” for operating a gaming facility. It is also rationally related to the County’s interest in making sure that the economic benefits associated with the conduct of bingo games were more evenly distributed. Likewise, it is clear from the Commentary to the 2005 Amendments that the Sheriff also sought to carefully balance those considerations with the ability to effectively regulate, monitor, and enforce the conduct of bingo games by limiting the number of active Class B Licenses to sixty. The 2004 Amendments and 2005 Amendments were within the authority delegated to the Sheriff through Amendment No. 744 and the methods that the Sheriff chose were rationally related to a legitimate purpose. Plaintiffs do not cite any cases to the contrary. Therefore, this Court should find that the 2004 Amendments and the 2005 Amendments do not violate the Equal Protection Clause of the Fourteenth Amendment. Accordingly, Plaintiffs cannot establish a substantial likelihood of success on the merits. Consequently, Plaintiffs' motion for a preliminary injunction fails as a matter of law.

2. Even If This Court Were To Find That The Plaintiffs' Application Is Not Fatally Flawed, The Plaintiffs Would Not Be Entitled To The Relief They Seek.

Plaintiffs request this Court to invalidate the 2004 Amendments and the 2005 Amendments. The Plaintiffs contend that if the Court rolls back the Amendments, then they would be entitled to a Class B Bingo License[6]. However, Plaintiff Reach One's application is incomplete under the 2003 Bingo Rules.

In order for Reach One to obtain a Class B Bingo License under the 2003 Bingo Rules, Plaintiff Reach One must conduct bingo at a "qualified location." Plaintiff Reach One states that it has entered into a contract with Plaintiff MCI to operate the facility where

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[6]Plaintiff MCI is not eligible to apply for or obtain a Class B Bingo License under Amendment No. 744, and the Macon County Bingo Rules, because it is a for profit organization doing business in Macon County. The 2005 Amendments do provide for a Class B Bingo Operator's License, but MCI does not allege that it has applied for such a license or that it would meet the qualifications for the issuance of such a license.

Class B bingo would be conducted. (Comp. at ¶ 15.) Plaintiff MCI admits, however, that it does not currently have a facility. (See Comp. at ¶ 17)(stating that "MCI has purchased land for the facility, began construction of the facility and negotiated financing to purchase games for the operation of the facility.") Moreover, it is evident from the face of Reach One's application that it has failed to provide satisfactory evidence of eight of the ten requirements under the 2003 Bingo Rules. (Comp. at Ex. 4.)

Specifically, Reach One's application package lacks satisfactory evidence of: (1) public liability insurance of at least $5,000,000.00; (2) if liquor is served, liquor liability insurance of at least $1,000,000.00; (3) adequate parking for patrons and employees; (4) onsite security as prescribed by the Sheriff; (5) onsite first aid personnel as prescribed by the Sheriff; (6) accounting procedures, controls and security monitoring necessary to preserve and promote the operation of the bingo games and to ensure the protection of the charitable license holder and its patrons; (7) satisfactory evidence that the owner or owners of the location paid at least $5,000,000.00 for the land, building and other capital improvements comprising said location; and (8) satisfactory evidence that the location is fully compliant with the ADA. Therefore, the Plaintiff Reach One would not be entitled to the issuance of a Class B Bingo License even if the Court rolled back the 2004 Amendments and the 2005 Amendments.

B. Plaintiffs Failed to Establish Irreparable Injury

Plaintiffs have also failed to present evidence of irreparable injury. If the injury complained of can be remedied by money damages, then the injury is not irreparable and the request for a preliminary injunction is due to be denied. *See Cate v. Oldham*, 707 F.

2d 1176, 1189 (11th Cir. 1983)(stating that "[a]n injury is 'irreparable' only if it cannot be undone through monetary remedies.") With regard to the issue of irreparable injury, the Eleventh Circuit has stated:

> A showing of irreparable harm is "the *sine qua non* of injunctive relief." *Frejlach v. Butler*, 573 F.2d 1026, 1027 (8th Cir.1978). The injury must be "neither remote nor speculative, but actual and imminent". *Tucker Anthony Realty Corp. v. Schlesinger,* 888 F.2d 969, 973 (2d Cir.1989). An injury is "irreparable" only if it cannot be undone through monetary remedies. "The key word in this consideration is *irreparable.* Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Sampson,* 415 U.S. at 90, 94 S.Ct. at 953; *accord Jefferson County,* 720 F.2d at 1520.

Northeastern Florida Chapter of Ass'n of General Contractors of America v. City of Jacksonville, Fla., 896 F.2d 1283, 1285 (11th Cir. 1990). *See also, Reese v. Miami-Dade County*, 2003 WL 22025458 (11th Cir. July 14, 2003)(affirming the denial of a preliminary injunction on the basis that plaintiffs could sue for money damages in the event of injury).

In support of their contention that they have suffered and will suffer irreparable injury, Plaintiffs allege that "[b]usiness reputation, goodwill and income are being diminished every day that the purchased equipment is not in use and the land remains undeveloped. Further, the public service goals of the MCI/Reach One, Teach One venture are being frustrated because no funds are being generated." (Motion at ¶ 11.) Any damage or injury to the Plaintiffs due to loss of income or expenditures for the equipment and land can be remedied by an award of money damages.

Plaintiffs' claims regarding damage to goodwill, business reputation and frustration of public service goals are also without merit. Plaintiff Reach One was first recognized as a tax-exempt, nonprofit organization in January of 1997. (Comp. at Ex. 4.) Surely the inability to conduct Class B Bingo will not harm the reputation or goodwill of a charitable organization that has been recognized for over nine years. Moreover, Plaintiff MCI was not formed until June 2, 2005 and did not file its Articles of Incorporation with the Macon County Judge of Probate until July 14, 2005, a mere six days before Reach One submitted its application for a Class B Bingo License. (Comp. at Ex. 4.) Since Plaintiff MCI had only been in existence a very short period of time before contracting with Reach One, MCI does not have a constructed facility, and any potential profits from the conduct of bingo games at some point in the future are uncertain, any "public service goals" that Plaintiffs have for their joint venture do not constitute harm that can be remedied by the entry of a preliminary injunction.

C. Plaintiffs Failed to Establish that the Threatened Injury Outweighs the Harm to the Sheriff, Current Licensees, and the Public

Next, the Plaintiffs have failed to establish the third and fourth elements necessary for the issuance of a preliminary injunction: that their threatened injury outweighs the harm that an injunction may cause the Sheriff and that the injunction would not be adverse to the public interest. The Plaintiffs contend that the issuance of a preliminary injunction "will pose no undue harm upon the Defendant Sheriff" and "will pose no adverse effect upon public interest." (Motion at ¶¶ 12, 13.) Contrary to Plaintiffs' conclusory statements, the issuance of a preliminary injunction which awards a Class B Bingo License will pose a great deal of harm to the Sheriff, the current charitable licensees, and to the citizens of Macon County. The Legislature of Alabama and the citizens of Macon County have authorized the Sheriff to promulgate rules and regulations for the conduct of bingo. There are currently fifty-nine Class B Bingo Licensees and one Class B Bingo Operator Licensee operating in accordance with the 2005 Amendments. (Comp. at ¶ 14.) The Plaintiffs do not challenge the Sheriff's authority to promulgate the rules, just his authority to promulgate certain rules which the Plaintiffs do not like. The purpose of the 2004 Amendments and the 2005 Amendments is for the protection of the nonprofit organizations, the protection of the patrons, and the preservation of the general welfare. If this Court were to issue the preliminary injunction and require the Sheriff to issue a Class B Bingo License, this Court would cause a great deal of uncertainty for the current licensees and usurp the police powers of the Sheriff. The issuance of a preliminary injunction would substantially increase the administrative burden on the Sheriff's Department and could open the flood gates to nonprofit organizations that serve as nothing more than fronts for unscrupulous operators. The Plaintiffs have not and cannot establish that the injury to the Sheriff, the current licensees, and the citizens of Macon County would be outweighed by the alleged injury to the Plaintiffs. Therefore, the Plaintiffs are not entitled to the issuance of a preliminary injunction.

III. PLAINTIFFS' CLAIMS ARE NOT RIPE FOR ADJUDICATION

The purpose of the ripeness doctrine is to prevent the federal courts from exceeding their constitutional role by becoming embroiled in hypothetical, abstract disputes and by needlessly interfering in the workings of other branches of government. *See id.* at 648. *See also National Advertising Co. v. City of Miami,* 402 F.3d 1335, 1339 (11th Cir. 2005); *Atlanta Gas Light Co. v. Federal Energy Regulatory Comm'n*, 140 F.3d 1392 (11th Cir.

1998); *Digital Props, Inc. v. City of Plantation*, 121 F.3d 586 (11th Cir. 1997). At its most basic, ripeness is a question of timing. *See Johnson*, 730 F.2d at 648.

Although the Plaintiffs in the present matter allege that the Sheriff has not issued the requested bingo permit, he has not denied the permit either. In fact, the Plaintiffs allege that Sheriff Warren has indicated that the permit will be approved. The Plaintiffs' claims, therefore, are nothing more than fears or speculation that the permit will be denied at some unspecified point in the future. Such a contingent or remote injury, though, is insufficient to establish a ripe case or controversy under Article III. *See Hallandale Prof. Fire Fighters Local 2238 v. City of Hallandale*, 922 F.2d 756, 760-63 (11th Cir. 1991); *Johnson v. Sikes*, 730 F.2d 644, 648-49 (11th Cir. 1984). In the words of the Eleventh Circuit, "[t]he record in this case does not indicate any injury currently being suffered . . . and the future effect of the [sheriff's] rulings [on the bingo permit application] is speculative." *Johnson v. Sikes*, 730 F.2d 644, 649 (11th Cir. 1984). Furthermore, a "decision not to render an opinion advising what the law would be on an assumed set of facts is also consistent with the well-established rule that a court is never to 'anticipate a question of constitutional law in advance of the necessity of deciding it.'" *Id.* (quoting *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (quoting *Liverpool, N.Y. & P. S.S. Co. v. Emigration Comm'rs*, 113 U.S. 33, 39 (1885))). The absence of a concrete, final decision by Sheriff Warren regarding the bingo permit application renders the Plaintiffs' claims unripe. Therefore, Plaintiffs are not entitled to the issuance of a preliminary injunction. Consequently, their Motion is due to be denied.

WHEREFORE, the premises considered, the Defendant Sheriff David Warren moves this Honorable Court to deny the Plaintiffs' Application for Preliminary Injunction and Expedited Hearing.

Dated this 3rd day of April, 2006.

Respectfully submitted,

/s/Fred D. Gray
Fred D. Gray (GRA022)

/s/Fred D. Gray, Jr.
Fred D. Gray, Jr. (GRA044)

Attorneys for Defendant,
David Warren, Sheriff of Macon County, Alabama

OF COUNSEL:

GRAY, LANGFORD, SAPP, McGOWAN,
GRAY & NATHANSON
P.O. Box 830239
Tuskegee, AL 36083-0239
334-727-4830 Telephone
334-727-5877 Facsimile
fgray@glsmgn.com
fgrayjr@glsmgn.com

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Kenneth L. Thomas, Esq.
Ramadanah M. Salaam, Esq.

/s/Fred D. Gray, Jr.
OF COUNSEL